

**INDIANA BOARD OF TAX REVIEW**  
**Small Claims**  
**Final Determination**  
**Findings and Conclusions**

**Petition #:** 16-016-04-1-4-00006  
**Petitioners:** Thomas and Asuncion Maliekal-Kunen<sup>1</sup>  
**Respondent:** Washington Township Assessor (Decatur County)  
**Parcel #:** 095-10-09-03.14-105  
**Assessment Year:** 2004

The Indiana Board of Tax Review (the Board) issues this determination in the above matter, and finds and concludes as follows:

**Procedural History**

1. The Petitioners initiated an assessment appeal with the Madison County Property Tax Assessment Board of Appeals (PTABOA) by written document dated May 18, 2005.
2. The PTABOA mailed notice of its decision on January 8, 2006.
3. The Petitioners filed an appeal to the Board by filing a Form 131 petition with the Decatur County Assessor on February 3, 2006. The Petitioners elected to have this case heard in small claims.
4. The Board issued a notice of hearing to the parties dated May 9, 2006.
5. The Board held an administrative hearing on June 29, 2006, before the duly appointed Administrative Law Judge Alyson Kunack.
6. Persons present and sworn in at hearing:
  - a) For Petitioners: Milo Smith, taxpayer representative
  - b) For Respondent: Robin Nobbe, Decatur County Assessor<sup>2</sup>  
Helen Wagener, witness

**Facts**

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<sup>1</sup> As discussed *infra*, the Form 131 petition originally was filed in the name of the prior owners of the subject property, Larry and Cynthia McCammet.

<sup>2</sup> Ms. Nobbe filed a Notice of County Assessor Representation authorizing her to represent the Washington Township Assessor in this case.

7. The subject property is classified as commercial, as is shown on the property record card for parcel 095-10-09-03.14-105. The property is located at 920 Kathy's Way, Greensburg, Indiana.
8. The Administrative Law Judge (ALJ) did not conduct an inspection of the property.
9. The PTABOA determined that the assessed value of the subject property is \$234,800 for the land and \$286,600 for the improvements for a total assessed value of \$521,400.
10. The Petitioners request a value of \$150,000 for the land and \$286,600 for the improvements for at total value of \$436,600.

### **Parties to Appeal**

11. Milo Smith, the certified tax representative who filed the Form 131 petition, named the former owners of the subject property, Larry L. and Cynthia R. McCamment, as the petitioners. *See Board Ex. A.* Mr. Smith signed the Form 131 petition and attached a power of attorney executed by Thomas Maliekal-Kunen. *Id.* At the hearing, Mr. Smith submitted a copy of a warranty deed for the subject property from the McCamments as grantors to Thomas and Asuncion Maliekal-Kunen, as grantees. *Pet'rs Ex. 13.* The warranty deed is dated May 1, 2003, and provides that the Maliekal-Kunens shall be responsible for the second installment of real estate taxes due and payable in "Fall" 2003 and for all subsequent taxes. *Id.*
12. The Respondent contends that the Board should dismiss the Form 131 Petition because the McCamments did not own the subject property as of the March 1, 2004, assessment date at issue in this appeal. While the petition was filed in the name of the McCamments, the real parties in interest are Thomas and Asuncion Maliekal-Kunen. Mr. Smith clearly intended to bring the appeal on behalf of the owners of the subject property, and, as reflected by the power of attorney attached to the Form 131 Petition, he was authorized to do so. The Respondent suffered no prejudice from Mr. Smith's error. Based on those facts, the Board denies the Respondent's request to dismiss the appeal. The Board hereby orders that the Form 131 Petition is amended to reflect correct names of the Petitioners - Thomas and Asuncion Maliekal-Kunen.

### **Issues**

13. Summary of Petitioners' contentions in support of alleged error in assessment:
  - a) The adjusted base rate for the portion of the subject property classified as undeveloped usable land is incorrect. *Smith argument.* According to the Real Property Assessment Guidelines for 2002 – Version A (Guidelines), the adjusted rate should equal the base rate multiplied by a size adjustment factor. *Id; Pet'rs Ex. 2.* On the current property record card, the base rate is \$120,000 per acre, and the size adjustment factor is 1.00, which should lead to an adjusted rate of

\$120,000 per acre. The Respondent, however, applied an adjusted rate of \$188,400 per acre. *Smith testimony; Pet'rs Ex. 3.*

- b) A 0.41-acre section of the subject property consists of a right-of-way for a public highway. *Smith testimony.* Mr. Smith testified that he has visited the property and that a road exists. *Smith testimony.* The Petitioners also presented an aerial photograph of the subject property showing a road leading to a YMCA. *Id; Pet'rs Ex. 8.* The Petitioners point to Ind. Code § 6-1.1-4-14 and the Guidelines for the proposition that, while land within a right of way that is used and occupied as a public highway may be assessed to the adjacent property holder, if the land has not been transferred by deed to the holder of the right-of-way, the value of that land must be subtracted from the adjacent property holder's assessment. *Smith testimony; Pet'rs Ex. 5.*
- c) The City of Greensburg<sup>3</sup> annexed the subject property on August 4, 1997. *Smith testimony; Pet'rs Ex. 3.* The Petitioners submitted a survey map, which they contend shows the territory annexed. *Id.* According to Mr. Smith, that map shows the existence of a "right-of-way used for the access." *Id.* Although the parcel as it existed in 1997 was later divided into two smaller parcels, one of which is the subject property, the "road easement" reflected on the 1997 annexation survey did not change. *Smith testimony; Pet'rs Ex. 1.* The Petitioners also contend that the term "annex" means, "[t]o incorporate (territory) into an existing political unit such a country, state, county, or city." *Smith testimony; Pet'rs Exs. 3, 4.*

14. Summary of Respondent's contentions in support of the assessment:

- a) The Respondent agrees that the adjusted base rate applied to the undeveloped usable land is incorrect due to a computer error. *Wagener testimony.* The base rate of \$120,000 is correct, but the computer came up with an incorrect adjusted rate. *Id.*
- b) The Respondent agrees that the 0.41 acres at issue currently are within a public highway right-of-way. *Id.* As of the March 1, 2004, assessment date, however, the Petitioners had not transferred that land by deed. Neither the annexation of land nor its proposed use as a right-of-way means that the land has been transferred legally. Until such a transfer occurs, the land is assessable to the adjacent property holder. *See Wagener testimony.*

### Record

15. The official record for this matter is made up of the following:

- a) The Petition.

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<sup>3</sup> The Petitioner did not identify the governmental entity that annexed the subject property. The survey map submitted by the Petitioner, however, refers to the City of Greensburg. *See Pet'rs Ex. 3.*

b) The digital recording of the hearing.

c) Exhibits:

Petitioners' Exhibit 1: Summary of Petitioners' arguments

Petitioners' Exhibit 2: REAL PROPERTY ASSESSMENT GUIDELINES FOR  
2002 – VERSION A, Chapter 2, pp. 96-98

Petitioners' Exhibit 3: Subject Property Record Card (PRC)

Petitioners' Exhibit 4: Survey map showing annexed area

Petitioners' Exhibit 5: Definition of “annexed”, from Dictionary.com

Petitioners' Exhibit 6: Survey map showing subject property and right-of-  
way

Petitioners' Exhibit 7: Ind. Code § 6-1.1-4-14

Petitioners' Exhibit 8: Aerial photograph showing subject property

Petitioners' Exhibit 9: REAL PROPERTY ASSESSMENT GUIDELINES FOR  
2002 – VERSION A, Chapter 2, p. 28

Petitioners' Exhibit 10: Aerial photograph/map and property ownership  
record

Petitioners' Exhibit 11: Copy of map detailing measurements of right-of-  
way

Petitioners' Exhibit 12: PRC showing requested changes

Petitioners' Exhibit 13: Warranty Deed for subject property dated May 1,  
2003

Respondent's Exhibit 1: Form 115 for 915 Kathy's Way, and property  
ownership record for the subject property

Respondent's Exhibit 2: Ind. Code § 6-1.1-1-9

Respondent's Exhibit 3: REAL PROPERTY ASSESSMENT GUIDELINES FOR  
2002 – VERSION A, Chapter 2, p. 28

Board Exhibit A: Form 131 Petition

Board Exhibit B: Notice of Hearing

Board Exhibit C: Hearing Sign-in Sheet

Board Exhibit D: Order Regarding Conduct of Hearing

d) These Findings and Conclusions.

### **Analysis**

16. The most applicable governing cases are:

- a) A petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax

Ct. 2003); *see also*, *Clark v. State Board of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

- b) In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer’s duty to walk the Indiana Board . . . through every element of the analysis”).
  - c) Once the petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the petitioner’s evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the petitioner’s evidence. *Id.*; *Meridian Towers*, 805 N.E.2d at 479.
17. The Petitioners provided sufficient evidence to support their contention that the Respondent assessed the portion of the subject property classified as undeveloped usable land using an incorrect base rate. The Board reaches this conclusion because:
- a) The Petitioners contend that the Respondent erroneously assessed the Petitioners’ undeveloped usable land using an adjusted base rate of \$188,400, rather than the appropriate rate of \$120,000. The Respondent conceded its error and agreed that the correct adjusted base rate is \$120,000 per acre.
  - b) Based on the undisputed testimony, the Board finds that the portion of the subject property classified as undeveloped usable land should be assessed using an adjusted base rate of \$120,000 per acre.
18. The Petitioners did not provide sufficient evidence to support their contention that the value assigned to a .41-acre portion of the subject property should be deducted from the assessment. The Board reaches this conclusion because:
- a) The Petitioner claims that the value attributable to a .41-acre portion of the subject property should be deducted from the subject property’s assessment because it is within a right-of-way that is used and occupied as a public highway. The Respondent acknowledges that the .41-acre tract at issue currently is used as a public highway; however, the Respondent contends that it properly assessed that land as part of the subject property because the Petitioners did not transfer that tract until after the March 1, 2004, assessment date at issue in this appeal. Both parties rely upon Ind. Code § 6-1.1-4-14 and Real Property Assessment Guidelines for 2002 – Version A to support their respective positions.
  - b) Ind. Code § 6-1.1-4-14 provides, in relevant part:
    - (a) Except as provided in subsection (b) of this section, land may not be assessed to an adjacent property holder if it:

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(4) is within a right-of-way that is used and occupied as a public highway.

(b) Where land described in (a)(1), (a)(2) or (a)(3) has not been transferred by deed to a person who holds that land for railroad, interurban, street railway, levee, drainage, or public highway purposes, the land shall be assessed to the adjacent property owner. However, the assessed value of the land so assessed shall be deducted from the assessed value of the land assessed to the adjacent property owner. . . .

The Guidelines contain an almost identical provision. *See* REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 28 (incorporated by reference at 50 IAC 2.3-1-2).

- c) Both Ind. Code § 6-1.1-4-14 and the Guidelines clearly provide that an adjacent property holder shall not be assessed for the value of land located within a right-of-way that is used and occupied as a public highway. Moreover, contrary to the Respondent’s contentions, this is true regardless of whether the adjacent property holder has transferred legal title to land within the right-of-way. Thus, the mere fact that the Petitioners had not conveyed fee simple title to the .41 acres as of the March 1, 2004, assessment date is not dispositive of the issue before the Board. The relevant question is whether the .41 acre tract was subject to a right-of-way, easement or other interest in favor of the public to use the land as a public highway as of the assessment date. It is with that question in mind that the Board turns to the facts presented by the parties.
- d) Larry and Cynthia McCamment, transferred the subject property to the Petitioners on May 1, 2003. *Pet’rs Exs. 8, 13; Resp’t Ex. 2*. The next transfer reflected by the “ownership records” of the Decatur County Auditor is an entry of “DED” for April 13, 2004, which appears to refer to the .41-acre tract at issue. *Id.* While neither party explained the import of the abbreviation “DED,” the most likely interpretation is that such entry reflects a dedication of the tract for public use. In any event, given the Respondent’s concession that the tract currently is being used as a public road, the Board finds that such entry is sufficient to show that the tract was within a right-of-way used and occupied as a public highway as of April 13, 2004.
- e) The Petitioners, however, submitted virtually no evidence regarding whether the land at issue was burdened by a “right-of-way” or other easement for use as a public highway prior to April 13, 2004. The Petitioners did not present evidence that they or any of the prior owners of the subject property conveyed an easement for public use prior to the April 13, 2004, dedication. The Petitioners likewise did not present evidence that members of the public had used the .41 acres in a

manner sufficient to create a public highway prior to the April 13, 2004, dedication. *See Chaja v. Smith*, 755 N.E.2d 611, 614-17 (holding that, under prior language of Ind. Code § 8-1-20-15, usage of a street by members of the public for twenty years constituted public acceptance of dedication).

- f) At most, the annexation survey map submitted by the Petitioners reflects that the .41-acres at issue were subject to “access and utility easements.” *Pet’rs Ex. 3*. The map, however, does not describe the extent of the rights conveyed by those easements or indicate whether the “access” rights benefited specific properties or the public generally. While Ind. Code 6-1.1 does not contain a statutory definition of the term “public highway,”<sup>4</sup> the Board interprets that term to contemplate something more than a private road over which members of the public may travel. Thus, to be within a “right-of-way” used and occupied as a “public highway,” there must be an enforceable interest in the land running in favor of the public at large. Typically, that interest will be held in trust by governmental entities, as when land is dedicated and accepted for public use. *See Beaman v. Smith*, 685 N.E.2d 143, 147 (Ind. Ct. App. 1997)(quoting *Interstate Iron & Steel Co. v. East Chicago*, 187 Ind. 506, 118 N.E. 958, 959 (1918)(“The long-standing statutory dedication scheme in Indiana has been that the owner who ‘plats a street and acknowledges the plat and has it approved and recorded grants to the municipality, in trust for the public, title to an easement for a street . . . .’”). In such cases, although an adjacent property holder may maintain a fee interest in the land, an indefeasible interest vests in the public, and the fee owner cannot convey good title. *Chaja v. Smith*, 755 N.E.2d 611, 616 (Ind. Ct. App. 2001). The fee holder’s remaining interest in the property is, in a sense, illusory. This differs from other easements benefiting neighboring properties. In those instances, the fee holder of the servient estate may convey title, although the possessory interest conveyed will be subject to the easement. *Kammerling v. Grover*, 9 Ind. App. 628, 36 N.E. 922, 923 (1894).
- g) The above interpretation of Ind. Code § 6-1.1-4-14 makes sense in light of Indiana’s general statutory and regulatory scheme of assessment. Real property is assessed based upon its “true tax value,” which is defined as “the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). Various factors may affect a given property’s market value-in-use, including easements encumbering

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<sup>4</sup> The term is defined in various ways throughout the Indiana Code. *See, e.g.*, Ind. Code § 9-25-2-4 (defining “public highway” “a street, an alley, a road, a highway, or a thoroughfare in Indiana, including a privately owned business parking lot and drive, that is used by the public or open to use by the public,” for purposes of statutes dealing with motorists’ financial liability); Ind. Code § 6-6-2.5-18 (defining the “public highway” to mean “the entire width between boundary lines of each publicly maintained way in Indiana, including streets and alleys in cities and towns, when any part of the way is open to the public use for motor vehicle travel,” for purposes of statute dealing with special fuel taxes). The Board, however, does not find these statutory definitions to be controlling. They arise in contexts unique to the policy concerns behind the statutes in which they arise and into which they are incorporated, and they do not necessarily reflect the policy concerns underlying Ind. Code § 6-1.1-4-14.

the property. See GUIDELINES, ch. 2 at 56, 61 (indicating that a negative influence factor may be applied to reflect “a decrease based on encumbrances, restrictive covenants or obstructions that limit the use of land); see also, *Talesnick v. State Bd. of Tax Comm’rs*, 756 N.E.2d 1104, 1108 (Ind. Tax Ct. 2001) (“The use of influence factors are appropriate for making adjustments to the value of land that is encumbered by an easement.”). In valuing the property, assessors must determine the extent to which such easements affect the market value-in-use of the property. *Id.* Similarly, to the extent a taxpayer bases his appeal on the existence of an easement encumbering his property, the taxpayer must quantify the effect of that easement on the market value-in-use of his property. See *Talesnick*, 756 N.E.2d at 1008. Ind. Code § 6-1.1-4-14 effectively removes that burden from assessors and taxpayers in the case of certain narrowly defined easements. One must assume that the General Assembly did so on grounds that such easements, by their very nature, always deprive the property owner of any value from the encumbered portion of the property, or that the public benefit from the easement is manifest.

- h) Thus, the Petitioners’ reliance on the existence of undefined “access and utility” easements prior to the April 13, 2004, dedication of the .41 acre tract is insufficient to establish a prima facie case of error. The fact that City of Greensburg annexed territory that included the subject property in 1997 does nothing to alter the Board’s conclusion. The Petitioners do not allege that the city condemned the .41 acres at the time of annexation or otherwise explain how the annexation operated to create a right-of-way for use as a public highway. The Petitioners simply point to the following definition of the term “annex” that they obtained from a web site: “to incorporate territory into an existing political unit such as a country, state, county or city.” *Pet’rs Ex. 4*. The mere fact that a city expands its borders to incorporate territory previously outside of its jurisdiction does not equate to the creation of a right-of-way or other legal or equitable interest burdening the property annexed. The Petitioners point to no authority for such a proposition.
- i) Based on the foregoing, the Petitioners failed to present a prima facie case of error in the March 1, 2004, assessment of the subject property.

### **Conclusions**

- 19. Based on the undisputed testimony, the Board finds that the Respondent applied an incorrect adjusted base rate to the portion of the subject land classified as “undeveloped usable.” The adjusted base rate should be changed to \$120,000 per acre.
- 20. The Petitioners failed to make a prima facie case that a .41-acre portion of the subject property was within a right of way that was used and occupied as a public highway as of the March 1, 2004, assessment date at issue. The Board finds in favor of the Respondent on that issue.

## Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines that the assessment of the portion of the subject property classified as secondary land should be changed.

ISSUED: **September 27, 2006**

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Commissioner,  
Indiana Board of Tax Review

## IMPORTANT NOTICE

### - Appeal Rights -

**You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.** You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at [http://www.in.gov/judiciary/rules/trial\\_proc/index.html](http://www.in.gov/judiciary/rules/trial_proc/index.html). The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.